Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996-1997

MICHAEL WEISS

Petitioner

versus

MORENO VALLEY UNIFIED HIGH SCHOOL DISTRICT; MORENO VALLEY UNION HIGH SCHOOL DISTRICT BOARD OF EDUCATION MEMBERS; MORENO VALLEY PUBLISHING COMPANY; DOES 1 THROUGH 20 INCLUSIVE

Respondents

PETITION FOR WRIT OF CERTIORARI, TO NINTH CIRCUIT COURT APPEALS

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37 pp

I. QUESTIONS FOR REVIEW

1. Despite advance Notice of Settlement, could Ninth Circuit issue its initial decision; and, then later deny a petition for rehearing despite mootness..

2. Are FRCP 11 sanctions proper against an attorney because he challenged the standing of opposing attorneys under the totality of circumstances in this case.

3. Does 28 USC 1927 authorize payment of $5000 to the US District Court Clerk for unnecessary work.

4. Is Due Process Clause satisfied by one sentence FRAP 38 OSC from Ninth Circuit.

II. TABLE OF CONTENTS

(Page)

I. QUESTIONS FOR REVIEW 2

II. TABLE OF CONTENTS 3

III. TABLE OF AUTHORITIES 3

IV. REFERENCE TO OFFICIAL REPORTS

V. TRIAL COURT JURISDICTION

VI. SUPREME COURT JURISDICTION: . . . 5

VII. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

VIII. REASONS FOR WRIT

IX. STATEMENT OF THE CASE

X. ARGUMENT FOR WRIT

XI. CONCLUSION

III. TABLE OF AUTHORITIES

Advisory Committee Notes To FRAP 38 . .16

UNITED STATES v. HVASS (78 S.Ct. 501, 355 U.S. 570, 2 L.Ed.2d 496) 29

Article Three 23

Bankers Trust Co. v. Mallis (98 S.Ct. 1117, 435 U.S. 381, 55 L.Ed.2d 357) . 11

BRADLEY v. FISHER (80 U.S. 335; 20 L. Ed. 646 at page 300) 23

California Education Code 35205 and 35163 29

Fifth Amendment Due Process Clause . 23

First Amendment Petition Clause . . . 23

FRCP 79(a) 12

GRAY v. MISSISSIPPI (481 U.S. 648; 107 S. Ct. 2045; 95 L. Ed.2d 622) 23

Hedges v. Resolution Trust Corp. (32 F.3d 1360, C.A.9 (Ariz.) 1994) 26

Medo Photo S. Corp. v. National Labor R. Board, (64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007) 31

MGIC Indem. Corp. v. Moore (952 F.2d 1120, C.A.9 (Cal.) 1991) 26

N.L.R.B. v. Local Union No. 103, Intern. Ass'n of Bridge, Etc. Workers, AFL-CIO (98 S.Ct. 651, 434 U.S. 335, 54 L.Ed.2d 586) 31

N.L.R.B. v. Truitt Mfg. Co. (76 S.Ct. 753, 351 U.S. 149, 100 L.Ed. 1027) . 29

Peretz v. United States (111 S.Ct. 2661, 501 U.S. 923, 115 L.Ed.2d 808) . . . 23

RIO GRANDE IRRIGATION & COLONIZATION CO. v. GILDERSLEEVE (19 S.Ct. 761, 174 U.S. 603, 43 L.Ed. 1103) 29

Roadway Express, Inc. v. Piper (100 S.Ct 2455; 477 U.S. 752; 65 L.Ed2d 488) . 19

Sanders v. Los Angeles Unified School Dist. (C.A.9 (Cal.) 1992, 979 F.2d 855) 11

TUMEY v. OHIO (47 S.Ct. 437, 273 U.S. 510, 71 L.Ed. 749) 22

United States v. Austin (749 F.2d 1407, C.A.9 (Nev.) 1984) 22

United States v. Indrelunas (93 S.Ct. 1562, 411 U.S. 216, 36 L.Ed.2d 202) . 11

USDC Local Rule 2:2.5.2. 29

USDC Local Rule 7.4 and 16.10 9

Young v. United States ex rel. Vuitton et Fils S.A. (107 S.Ct. 2124, 481 U.S. 787, 95 L.Ed.2d 740) 27

IV. REFERENCE TO OFFICIAL REPORTS: None.

V. TRIAL COURT JURISDICTION: 28 USC 1331, 1343; and 1367.

VI. SUPREME COURT JURISDICTION: Certiorari under 28 USC 1254(1). This Petition is timely under Rule 13.3 as it was filed within 90 days of the Ninth Circuit Order Denying a petition for rehearing dated July 15, 1996.

VII. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED: 5th Amendment Due Process Clause, First Amendment Petition Clause and Article III; 28 USC 1927; FRCP 11, FRAP 38 and California Education Code 35205 and 35163.

VIII. REASONS FOR WRIT: Appendix Tab 2 is the Ninth Circuit Memo at issue herein

which at page 3 holds that "Weiss was not denied due process and his First Amendment rights were not violated," which thus placed the Constitutional issues squarely before this Court for de novo review. Another reason for seeking this Writ is because of the need of this Court to use its supervisory powers to police against abusive judicial authority due to the fact that the Ninth Circuit issued FRAP 38 without adequate notice and opportunity to be heard and despite mootness; and because the Ninth Circuit upheld a 28 USC 1927 sanction order beyond the definition of "costs" and hence beyond is subject matter jurisdiction; and, because of retaliation in refusing to acknowledge that settlement between the parties mooted out the appeal. This is because Ninth Circuit Judges Wallace,

Browning and Farris presided in the Maxie appeals in which Maxie challenged the authority of the Special Administrator of his sons Estate to settle the Estates causes of action for $500,000, alleging fraud insofar as she claimed to be representing the Estate interests insofar, as she declared under penalty of perjury that the Estate was penniless and kept the $500,000 all for herself. Maxie brought an Emergency Writ seeking to stay settlement (see US S Ct Case # 96-5023 Appendix to Writ Tab #14 "Appellants motion for stay of settlement in the trial court is denied.") Then Maxie brought appeals challenging the settlement as a product of fraud and Ninth Circuit Judges Wallace, Browning and Farris held that the settlement mooted out each and every issue on

appeal. Now in this case a settlement was reached by Maxie's attorney Weiss yet Ninth Circuit Judges Wallace, Browning & Farris award double costs to Moreno under FRAP 38 after receiving notice of the settlement between attorney Weiss and Moreno.

IX. STATEMENT OF THE CASE:

1. Appellants Appendix Tab 7 #2 contains the USDC docket sheets, from which the following statement of the case, taken in conjunction with other record evidence is tendered. Tab 7#2 at entry #3 states: "3-21-94 Default entered as to defendant Moreno." Entry #4 shows that on 4-18-94 the District Court issued its OSC re Dismissal for Lack of Prosecution, which spurred Weiss to seek a default Judgment or face dismissal of his clients lawsuit. Entry #13 shows that **all** proceedings

regarding the Application for Default were referred to Magistrate Groh and Moreno's Motion For Sanctions was part and parcel of said referral but the District Court itself ruled on that Motion. Entry #26 shows that on 6-26-94 Magistrate Groh filed his Report and Recommendation re Default Judgment, in which he determined that there was no proper service of Summons and Complaint upon Moreno; and, that he never reached the issue of Moreno being represented by the law firm of Leibman, Reiner et al. The latter issue was the one the District Court awarded sanctions on. Entry #33 states "7-11-94 Order...that report and recommendation of US Mag Judge be approved and accepted in this case." Entry #38 shows that Leibman, Reiner filed its Motion for Sanctions on June

28, 1994 with a hearing date of July 11, 1996 in violation of USDC Local Rule 7.4 and 16.10 (cited below) which required that said motion be **filed** 20 days before the hearing date, since it was filed 13 days before the hearing date; and, more importantly because it was filed before (not after) the entry of the District Courts final order.

"7.4 Notice and Service of Motion. The notice of motion and all moving papers in support thereof shall be filed with the Clerk not less than twenty (20) days prior to the Motion Day for which the matter is noticed."

"16.10 Filing Date for Attorney's Fees. *Any* motion or application for attorney's fees shall be served and filed within thirty (30) days *after* the entry of judgment or other

final order, unless otherwise ordered by the Court. Such motions and their disposition shall be governed by Local Rule 7." Entry #29 shows that attorney Weiss was substituted out of the case on June 29, 1994. From June 30 until July 19, attorney Weiss was in Iceland. Entry #34 indicates that on 7-11-94 "the Court ...having *heard* statement of counsel, Michael Alan Weiss... is ordered to pay sanction in the amount of $4062.35 forthwith and ...$5000 for unnecessary work shall be paid to the Clerk of the Court. It was physically impossible for the USDC to hear from attorney Weiss since he was out of the County in Iceland. The Reporters Transcript indicates that the USDC knew of this yet said "That's where he should practice law because from what we have seen of this

lawyer, not only in this case but in another case, he appears to be totally inept." (See the RT in Appendix Tab 7 at page 3:22-25.) Entry #34 went on to state that the Court shall issue an Order; but it never did as required by FRCP 58 ("Every judgment shall be set forth in a separate document. A judgment is effective only when so set forth and when entered as prescribed in Rule 79(a).") See Bankers Trust Co. v. Mallis (98 S.Ct. 1117, 435 U.S. 381, 55 L.Ed.2d 357); United States v. Indrelunas (93 S.Ct. 1562, 411 U.S. 216, 36 L.Ed.2d 202); and Sanders v. Los Angeles Unified School Dist. (C.A.9 (Cal.) 1992, 979 F.2d 855). Entry #39 shows that the USDC took off calendar Weiss' Motion for Reconsideration. Thereafter Weiss filed a Request for Oral Argument since he had

never once appeared before the District court; wanted to know what other case the District Court had referred to; and, had new and further evidence to present. But this document was not even listed on the Docket Sheet Registry, in violation of FRCP 79(a), let alone considered.

2. The docket sheets for the Ninth Circuit [found in Tab 7], in conjunction with other record evidence reveal the following statement of the case: On 5-30-96 Weiss filed Notice of Settlement with Moreno. This mooted out any and all issues between him and Moreno on the appeal. However, on 6-20-96 the Ninth Circuit affirmed the USDC and required Weiss to pay double costs under FRAP 38 to Moreno. On 6-28-96 Weiss filed a Motion for Reconsideration regarding mootness but the Ninth Circuit denied

same on 7-15-96 without explanation.

X. ARGUMENT FOR WRIT:

3. Weiss contends the Ninth Circuit retaliated against him on the mootness issue because that issue was the bone of contention in the Hamilton-Maxie Cases; see this Courts Cases # 96-5018; 96-5023; 94-8933; and 92-8916. In the Hamilton Cases attorney Weiss on behalf of his client Maxie, contended that a $500,000 settlement negotiated by an Estate Administratrix did not moot out an appeal regarding intervention and other issues by the father of the decedent because the settlement was a product of fraud since she never represented the Estates interests, but rather only her own interests which proposition was supported by her Declaration to the Probate Court that the Estate was penniless. Judicial

notice is requested to establish that Ninth Circuit Judges **BROWNING, WALLACE and FARRIS** presided on both the Hamilton and Moreno Cases. See US S Ct Case #96-5023 Appendix to Writ at Tabs 7 which states: "Maxie's appeal of the District Courts denial of his motion to intervene is moot because the underlying action has been dismissed....Because Maxie's appeal from the District courts denial of his motion to intervene and is moot and because he lacks standing to appeal the District Courts dismissal of Hamilton's action, we dismiss his appeal." See US S Ct case #96-5023 at Appendix Tab 10 which is a 7-21-94 Order (by Judge Farris which states: "Plaintiff-appellee's motion to dismiss the appeal as moot is granted. See US v Ford (cite omitted) (dismissing appeal from decision of motion to

intervene as moot where underlying action was terminated," See US S Ct Case #96-5023 Appendix to Writ at Tab 5 which is a 4-6-95 Order (by Judge Browning) stating "Appellees motion to dismiss the appeal as moot is granted. See US v Ford (cite omitted). All pending motions are denied as moot."

4. The Ninth Circuit Docket Sheet 4-11-96 entry and Tab 3 to his Appendix shows that the Ninth Circuit issued its FRAP 38 OSC to Weiss; but, it was a one sentence document which did not comply with the rudiments of providing notice at a meaningful time in a meaningful manner. In the Hamilton Case a similar one sentence FRAP 38 OSC was issued to Weiss, (see US S Ct Case #96-5023 at Appendix Tab #2) which was challenged there, as is here, since it violates the Fifth

Amendment Due Process Clause. More specificity is required to make said notice meaningful per the Advisory Committee notes behind FRAP 38 which state: "1944 Amendment: The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace

that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the court's discretion."

Attorney Weiss challenged the lack of opportunity to respond to the District Courts sanction order insofar as its statement to the effect that "because from what we have seen of this lawyer, not only in this case but in another case, he appears to be totally inept."

5. As for the District Courts "excess" cost sanction authorized by 28 USC 1927,

Weiss contends that he was sanctioned beyond the scope of "costs" as authorized by the statute.

6. "A Section 1927 provides that lawyers who multiply court proceedings vexatiously may be assessed the excess "costs" they create. Courts generally have defined costs under s 1927 according to 28 U.S.C. s 1920, which enumerates the costs that ordinarily may be taxed to a lo920 and s 1927 should be read together as part of the integrated statute approved in 1853. In the absence of express modification of those provisions by Congress, however, we should not look beyond the Act for the definition of costs under s 1927. But s 1927 does not distinguish between winners and losers, or between plaintiffs and defendants. The statute is ... concerned

only with limiting the abuse of court process." Roadway Express, Inc. v. Piper (100 S.Ct 2455; 477 U.S. 752; 65 L.Ed2d 488)

7. Although s 1927 is concerned with the "excess" (not the regular costs) the USDC chose an arbitrary, capricious and discriminatory $5000 excess cost figure out of the clear blue sky. 28 USC 1920 does not include unnecessary use of the court's time as a cost any more than it does the cost of calling a jury. The $5000 amount was on top of the $4062.25 separately awarded attorney fees and costs, see Tab 7#28 - Declaration of J. Michael Declues. Attorney Weiss did not, as a matter of law, multiply the case and controversy because his client Gilliam filed a Request for Default and Application for Entry of Default.

Furthermore neither FRCP 55 nor the Local Rules required Weiss to mention that he was allegedly in close contact with Moreno's attorneys, Leibman, Reiner et al in the Request for Default. The USDC and Ninth Circuit say he did but they cited not one case, statute, rule nor regulation to support it; once again making up something out of the blue and depriving Weiss the opportunity at least to distinguish it. Since neither FRCP 55 nor any Local Rule of Court, nor any citation of authority from the USDC required such disclosure in a Request for Default, no FRAP 38 sanctions could be awarded because Weiss had good ground to show the USDC abused its discretion in awarding them. There was no clearly established law on the topic; and, this case appears to be one of first

impression.

8. "The court also noted that the cost of bringing the jury panel was $2,074. The court then imposed a sanction "under [1927] of Title 28 in the amount of $2,000." The court lacked the statutory authority to do so. Excess costs recoverable under 28 U.S.C. Sec. 1927 include only those taxable costs enumerated in 28 U.S.C. Sec. 1920 (costs taxable to a losing party). Roadway Express Inc. v. Piper, 447 U.S. 752, 757-60, 100 S.Ct. 2455, 2459-61, 65 L.Ed.2d 488 (1980). The cost of summoning a jury is not expressly set forth in section 1920 as an excess cost." United States v. Austin (749 F.2d 1407, C.A.9 (Nev.) 1984)

9. Under the above-cited Austin Case Ninth Circuit precedent the $5000

sanction was improper.

10. To award $5000 payable to the Clerk of the Court for unnecessary work raises conflict of interest concerns as expressed in TUMEY v. OHIO (47 S.Ct. 437, 273 U.S. 510, 71 L.Ed. 749). If that $5000 is going to the Judge or the Clerk, directly or indirectly, there is indeed a serious conflict of interest. Without a proper check over such 1927 sanctions the USDC Central District of California coffers grow larger and larger by the day.

11. When this is considered along with the fact that the USDC lambasted Weiss as one of the worst attorneys it has seen because of what he did in another case (case unidentified), was totally inept, and should be practicing law in Iceland, a reasonable man would question whether

the scales of justice were being held evenly. As required by the Fifth Amendment Due Process Clause, the First Amendment Petition Clause and Article Three, a reasonable man could question whether attorney Weiss was before an impartial adjudicator as he was entitled to, per Peretz v. United States (111 S.Ct. 2661, 501 U.S. 923, 115 L.Ed.2d 808); GRAY v. MISSISSIPPI (481 U.S. 648; 107 S. Ct. 2045; 95 L. Ed.2d 622); and BRADLEY v. FISHER (80 U.S. 335; 20 L. Ed. 646 at page 300). By refusing to identify this other case Weiss was involved in the USDC once again makes up things out of the blue and deprives Weiss of the opportunity to at least meet the challenge and deprive him of fundamental due process. Although 2 USDC Minute Orders indicated that another Order would

follow regarding the sanctions, and since it never did, once again a reasonable man could question whether Weiss was appearing before an impartial judge and being afforded due process of law. Finally the refusal of the USDC to entertain oral argument despite a written request for same by attorney Weiss is the epitome of unfairness and oppression, especially since Weiss never once had the opportunity to appear before the USDC in this case.

12. Weiss in not mentioning the alleged close contact with Moreno's attorneys Leibman, Reiner et al. in the Request for Default was at best, nothing more than simple negligent conduct which could not support a 28 USC 1927 sanction per the below cited MGIC 9th Circuit precedent.

13. "II [1] Rule 11...applies only to the initial signing and imposes no continuing duty on the signer. Cunningham v. County of Los Angeles, 879 F.2d 481, 490 (9th Cir.1988), cert. denied. 493 U.S. 1035, 110 S.Ct. 757, 107 L.Ed.2d 773 (1990). It does not provide sanctions for failing to prepare and sign a document. United Energy Owners Comm. v. United States Energy Mgm't Systems, 837 F.2d 356, 364-65 (9th Cir.1988). [2] The district court made no specific finding of bad faith. Although it characterized Simpson's trial as "an abuse of this system" and felt that McKenna should have realized its suit against Simpson had no content by the time of immediate trial preparation, such observations are as consistent with negligence as with bad faith." MGIC Indem. Corp. v. Moore (952

F.2d 1120, C.A.9 (Cal.) 1991)

14. Weiss contends this Court must police the Ninth Circuit to prevent abuse of the judicial process; to prevent the appearance of abuse of the judicial process; and, also that the Ninth Circuit needs guidance on the issues of mootness and standing. See Hedges v. Resolution Trust Corp. (32 F.3d 1360, C.A.9 (Ariz.) 1994) which involved attorney standing; but, the opinion did not contain one word about it.

15. Weiss contended that Moreno's alleged attorneys Leibman, Reiner et al did not have authority to represent Moreno for three reasons: (a) they could not represent both the Board of Education as well as its members when the later were sued in their individual capacities (see Appendix Tab 7#21 -Declaration of J.

Michael Declues at paragraph 2: "I have been assigned to represent the Moreno Valley Unified School District and the individual Board members in the above-captioned matter." Appendix Tab 7 also includes Mr Gilliam's Complaint which at paragraph 2 stated: "Defendants Moreno Valley Union High School District Board of Education members Tracy Vackar, Frank West and Kelly Gillum, are sued in their individual capacities only..." Such conflict of interest is prohibited pertinent rules and regulations as noted by Young v. United States ex rel. Vuitton et Fils S.A. (107 S.Ct. 2124, 481 U.S. 787, 95 L.Ed.2d 740). Because (b) Weiss had asked Leibman, Reiner many times to show their authority as per California Education Code 35205 and 35163 cited just below, but they never did.

16. EDC 35205. "The governing board of any school district may contract with a qualified attorney in private practice to provide legal services and compensation of this attorney in private practice *pursuant to contract* under this section shall be a proper use of school district funds."

17. EDC 35163. "Every official action taken by the governing board of every school district shall be affirmed by a formal vote of the members of the board, and the governing board of every school district shall keep minutes of its meetings, and shall maintain a journal of its proceedings in which shall be recorded every official act taken."

18. Attorney Weiss had every right in the world to challenge these attorneys standing per Tab 7#21 and RIO GRANDE

IRRIGATION & COLONIZATION CO. v. GILDERSLEEVE (19 S.Ct. 761, 174 U.S. 603, 43 L.Ed. 1103), as well as UNITED STATES v. HVASS (78 S.Ct. 501, 355 U.S. 570, 2 L.Ed.2d 496) read in conjunction with USDC Local Rule 2.2.5.2.

19. "2.2.5.2 Form of Appearance. A law firm may appear in the following form of designation or its equivalent: John Smith A Member of Smith and Jones, P.C. Attorneys for Plaintiff

20. Neither the USDC Local Rules, nor the FRCP contained any authority to informally represent a party in litigation pending before the Court.

21. N.L.R.B. v. Truitt Mfg. Co. (76 S.Ct. 753, 351 U.S. 149, 100 L.Ed. 1027) (unfair labor practice case) is cited for the proposition that the refusal of Moreno alleged attorneys Leibman, Reiner

et al., to produce proper proof of attorney representation was proof of bad faith on their part, just like when the Union refused to produce authorization cards signed by employees. And because (c) Weiss's client Mr Gilliam, Principal and Administrator of the Moreno School, told him that it was reported out of a Board of Education meeting that O'Melveny & Myers represented Moreno in his lawsuit. Since Leibman, Reiner refused to produce proof of standing Weiss subpoenaed it see Tab 7#35. The SDT Response is found in Tab 7#40 which contains Moreno's Board of Education Minutes for 5-4-96 which state: "Mr. West reported out of closed session that the Board discussed...pending litigation... It had been reported out [that] in closed session in April 19, 1994 that O'Melveny

& Myers would represent the District in the Gilliam versus Moreno Valley lawsuit. **This was reconsidered** and the Board designated that Mr. J. Michael Declues of Leibman, Reiner, McNeil & Walsh will continue to represent the District, pending a decision from the JTPA on coverage." (Emphasis added) This evidence showed that O'Melveny & Myers, not Leibman, Reiner et al was designated (but designation is not equivalent to the required contract per Education Code 35205) to represent Moreno pending a decision on whether its insurance consortium would pick up the attorney fees.

22. Medo Photo S. Corp. v. National Labor R. Board, (64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007) and N.L.R.B. v. Local Union No. 103, Intern. Ass'n of Bridge,

Etc. Workers, AFL-CIO (98 S.Ct. 651, 434 U.S. 335, 54 L.Ed.2d 586) are unfair labor cases dealing specifically with the issue of when a Union attains majority standing which enables it to negotiate with an employer on behalf of the employees. If an objectively reasonable doubt exists about the Union's standing a certification election may be demanded by the employer. What constitutes a good faith reasonable doubt should apply to our case as well. Since the law is not clearly established, this case presents the opportunity for this Court to adopt its reasoning. As it turned out Leibman, Reiner et al did not in fact represent Moreno at the time; but, Magistrate Groh never reached the attorney standing issue and neither did the District Court nor the Ninth Circuit. Nonetheless attorney

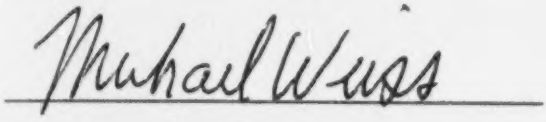
Weiss was sanctioned 2/3rds of his yearly income of $15,173 (see Appendix Tab 7#40 [Income Tax 1040 return]. The Ninth Circuit refused to allows Maxie the opportunity to proceed in forma pauper is despite evidentiary support regarding same, and despite notice that this Court had theretofore recently granted hin in forma pauper is standing (see US S Ct Case #96-5023 Appendix Tab 3-"Order: Appellant Maxie's motion for leave to proceed in forma pauper is on appeal is denied ... No motion for reconsideration, clarification or modification of the order shall be filed or entertained."

XI. CONCLUSION Weiss pray the Court entertain his petition and simply issue a summary affirmance or reversal, perhaps even with guiding instructions. Weiss recognizes the Court has many other cases

involving greater concerns and has limited resources spend in administering justice and therefore does not expect extensive consideration by this Honorable Court. Attorney Weiss recognizes that in this Courts 1995-1996 term, 12 of the 75 signed opinions came from the Ninth Circuit and that 10 of the 12 were reversed. Attorney Weiss further recognizes that for your 1996-1997 term 15 (nearly 1/3) of the cases you accepted for review came from the Ninth Circuit. Failure to police and supervise the abuse attorney Weiss suffered alone and by himself in this case due to a good faith challenge to attorney standing in but one document will result in sanctions which exceeded his yearly income. That would be a result that is oppressive, constitutionally defective, and otherwise

prohibited by 28 USC 1927 under the totality of circumstances.

RESPECTFULLY SUBMITTED,



Michael Weiss